IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:

B.S.W. CORPORATION

Debtor(s).

In Proceedings
Under Chapter 11

Case No. 01-31116

B.S.W. CORPORATION

Plaintiff(s),

v.

AMERON INTERNATIONAL CORPORATION

Defendant(s).

Adversary No. 02-3141

O P I N I O N

The issue before the Court in this case is whether a series of transfers from the debtor (Plaintiff) to the defendant, Ameron International Corporation, constitute preferential transfers within the meaning of § 547 of the Bankruptcy Code.

On March 26, 2001, the plaintiff, B.S.W. Corporation, filed its petition under Chapter 11. Prior to the filing of the petition, the parties entered into a series of sales transactions whereby defendant would provide the debtor with goods and bill the debtor by invoice. The payment terms for these invoices was net thirty (30) days. The debtor paid the defendant by check and, with each check, indicated the invoice numbers to which the payment was to be applied.

Within ninety days prior to the filing of the debtor's bankruptcy petition, the debtor transferred the following checks to the defendant, totaling $18,155.66, in payment of outstanding amounts due:

Invoice Date:	**Invoice No.**	**Payment Date**	**Amount**

11/22/2000	001226998-00	02/07/2001	$936.50
11/22/2000	001226996-00	02/07/2001	$539.20
12/04/2000	001225184-00	01/25/2001	$663.65
12/15/2000	001230944-00	01/25/2001	$2,166.86
12/18/2000	001230307-00	01/25/2001	$937.45
12/19/2000	001230944-01	01/25/2001	$1,595.00
1/10/2001	001233379-00	02/21/2001	$1,275.00
1/18/2001	001235602-00	02/26/2001	$2,550.00
1/25/2001	001236415-00	02/26/2001	$3,517.50
2/02/2001	001237358-00	02/26/2001	$353.12
2/07/2001	001238434-00	03/20/2001	$2,550.00
3/06/2001	001242352-00	03/22/2001	$2,977.50

Plaintiff's Brief, p. 3-4.

On May 24, 2002, the plaintiff filed the instant complaint to avoid the transfers as preferential transfers pursuant to 11 U.S.C. § 547(b). In its defense, the defendant makes several arguments. First, the defendant maintains that the transfers in question were "contemporaneous exchanges"[1] rather than payments on account of an antecedent debts and, therefore, do not constitute preferential transfers. Alternatively, the defendant maintains that the transfers fall within the purview of the "ordinary course of business" exception contained in § 547(c)(2)[2] and, therefore, are not subject to avoidance.

Plaintiff's Objection to Defendant's Exhibit "A"

Prior to ruling on the substantive issues of this case, the Court must first address an evidentiary matter which was taken under advisement as well. At trial, the defendant tendered a document titled "BSW Check

[1]Section 547(c)(1) excepts an otherwise preferential transfer from avoidance if the transfer was intended by the parties to be a "contemporaneous exchange for new value given to the debtor" and the transfer was, in fact, "substantially contemporaneous." See 11 U.S.C. § 547(c)(1).

[2]Section 547(c) (2) creates an exception for transfers made within the "ordinary course of business." An otherwise avoidable transfer will not be avoided if the transfer was in payment of a debt incurred in the ordinary course of business between the parties, and if the payment was made in the ordinary course of business between the parties and "according to ordinary business terms." See 11 U.S.C. § 547(c)(2)

Listing" which was marked as Defendant's Exhibit "A." The document is a chart prepared by defendant's counsel indicating, *inter alia*, the amounts of the checks in question, the invoice dates, the drawing bank, and the dates on which the checks were honored. The plaintiff objects to the admissibility of this document on the grounds that the substance of the chart is premised on hearsay.[3] Specifically, the plaintiff argues that the defendant did not elicit testimony from anyone at Bank of America, the honoring bank, to verify the honor dates or the amounts of the checks set forth in the exhibit. The Court agrees with the plaintiff that this exhibit is inadmissible. The chart was prepared by defendant's counsel and, while it contained some information duplicated in other exhibits, it also included third-party information and unattributed statements. Therefore, it must be excluded from evidence. See U.S. v. Davis, 261 F.3d 1, 42 (1st Cir. 2001).

Section 547(b)

The Court will now address the substantive issues presented by this case. Pursuant to § 547(b) of the Bankruptcy Code, a trustee, or, as in this case, a Chapter 11 debtor-in-possession, may avoid certain transfers made from the debtor's estate prior to the filing of the bankruptcy petition. Section 547(b) is designed not only to promote the Code's policy of equal distribution among creditors but, also, to reduce creditors' "incentive to rush to dismember a financially unstable debtor." Warsco v. Preferred Technical Group, 258 F.3d 557, 564 (7th Cir. 2001).

A transfer of property is preferential and, therefore, avoidable, if it (1) was made to or for the benefit of a creditor; (2) was for or on account of an antecedent debt, (3) was made while the debtor was insolvent; (4) was made on or within 90 days of the filing of the debtor's bankruptcy petition; and (5) it allows the creditor to receive more than it would have otherwise received. See 11 U.S.C. § 547(b). The plaintiff bears

[3]Federal Rule of Evidence 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

the burden of proving each of these necessary elements. In re Jones, 226 F.3d 917, 921 (7th Cir. 2000). The defendant concedes that the plaintiff has established most of the elements in this case. The only element at issue is whether the transfer in question was on account of an "antecedent debt" as required by § 547(b)(2).[4]

The term "antecedent debt" is not defined by the Bankruptcy Code. However, the courts have defined an antecedent debt as "a debt which is incurred prior to the relevant transfer." In re Durant's Rental Center, Inc, 116 B.R. 362, 366 (Bankr. D. Conn. 1990); see also, Matter of Cavalier Homes of Georgia, Inc., 102 B.R. 878, 885-886 (Bankr. M.D. Ga. 1989). As the Seventh Circuit Court of Appeals has explained, "[a]n antecedent debt exists when a creditor has a claim against the debtor, even if the claim is unliquidated, unfixed, or contingent." Warsco, 258 F.3d at 569.

In this case, the debts owed to the defendant were incurred prior to the transfer of funds by the plaintiff. According to the parties, the plaintiff would order goods from the defendant, which the defendant would deliver. It would then send the plaintiff a bill for those goods. See Defendant's Brief at 2. As the Seventh Circuit Court of Appeals has noted, "a debt arises under a contract only after the creditor has tendered performance." Matter of Wey, 854 F.2d 196, 200 (7th Cir. 1988), citing In re Gold Coast Seed Co., 751 F.2d 118, 119 (9th Cir. 1985). Therefore, the plaintiff's debt to the defendant was created at the time that the goods were delivered, regardless of the parties' payment terms. Further, a review of the invoices and checks submitted by the parties clearly indicate that all of the goods were delivered by the defendant prior to the transfer of funds by the plaintiff. Therefore, this Court finds that the transfers in this case were made on account of antecedent debts within the meaning of § 547(b)(2).

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[4]In its answer to the complaint, the defendant denied several of the plaintiff's allegations regarding other elements, including that the transfers were made while the debtor was insolvent and, further, that the transfers allowed it to receive more than it would have otherwise received in this case. However, at trial on the complaint, the defendant represented that the only element in question was whether the transfers were on account of antecedent debts. See Transcript at 13.

In its brief and at trial on the complaint, the defendant argued that the transfers in question were not on account of antecedent debts, but, rather, were contemporaneous exchanges. However, this argument confuses two distinct concepts, each with different burdens of proof. In order to successfully prosecute a complaint under § 547(b), the plaintiff is required to establish five elements, including that the transfer in question was on account of an antecedent debt. Once these elements have been established, the defendant has the burden of proving that the transaction falls within one of the exceptions set forth in § 547(c), which includes the "contemporaneous exchange" exception of § 547(c)(1). The exceptions of § 547(c) are "never called into play unless a preference is found to exist." In re Fulgham Constr. Corp, 14 B.R. 293, 306 (Bankr. M.D. Tenn 1981), aff'd in part and vacated on other grounds, 706 F. 2d 171 (6th Cir. 1983) (emphasis added). Therefore, it was improper for the defendant to raise the "contemporaneous exchange" exception in order to refute the plaintiff's evidence regarding the existence of an antecedent debt and the Court finds that the transfers in this case were on account of antecedent debts.

Having found that the transfers in this case were on account of antecedent debts and that the plaintiff has satisfied its burden of proof as to all of the elements of § 547(b), the Court must now determine whether any of the affirmative defenses raised by the defendant apply.

The Contemporaneous Exchange Exception

As indicated above, § 547(c)(1) contains the contemporaneous exchange exception. That section states:

> (c) The trustee may not avoid under this section a transfer—
>
> (1) to the extent such transfer was–
>
> (1) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (2) in fact a substantially contemporaneous exchange.

11 U.S.C. § 547(c)(1). Transfers that fall within this exception are not deemed preferential because they encourage creditors to continue to do business with financially troubled debtors, and because in such situations other creditors are not adversely affected if the estate receives new value. See, In re Jones Truck Lines, Inc., 130 F.3d 323, 326, (8th Cir. 1997). As Judge Meyers, a fellow Bankruptcy Judge for the Southern District of Illinois explained in In re Messamore, 250 B.R. 913, 919, n. 9 (Bankr. S.D. Ill. 2000):

> In enacting the 'contemporaneous exchange' defense of § 547(c)(1), Congress recognized that if a creditor provides new value in exchange for a preferential transfer, the estate has not been diminished, and, therefore, the creditor is entitled to protection to the extent of the new value provided.

In order to be successful under this defense, the defendant has the burden of proving by a preponderance of the evidence not only that a substantially contemporaneous exchange occurred but, more importantly, that the parties intended the transaction to be a contemporaneous exchange for new value. As the Seventh Circuit Court of Appeals has noted, "[t]he critical inquiry in determining whether there has been a contemporaneous exchange for new value is whether the parties intended such an exchange." Matter of Prescott, 805 F.2d 719, 727 (7th Cir. 1986) (emphasis added).

In the instant case, the defendant has offered no evidence as to the parties' intent when these transfers were made. Additionally, the defendant has not shown that "new value," if any, was given to the debtor in exchange for the transferred funds. Therefore, this Court finds that the defendant has failed to sustain its burden of proof and its defense under § 547(c)(1) must fail.

Ordinary Course of Business Exception

In addition to the "contemporaneous exchange" exception, the defendant also asserts that the transfers in question fall within the "ordinary course of business" exception to § 547(b) and, therefore, are not subject to avoidance. Section 547(c)(2) of the Bankruptcy Code states:

(c) The trustee may not avoid under this section a transfer—

(2) to the extent such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms.

11 U.S.C. § 547(c)(2).

This section is intended to insulate recurring, customary credit transactions between the parties which are incurred in the ordinary course of business. See, WJM, Inc. v. Massachusetts Dept. of Public Welfare, 840 F.2d 996, 1011 (1st Cir. 1988). The Seventh Circuit Court of Appeals has interpreted this section to "[require] the creditor [to] prove, by a preponderance of the evidence, that the transaction was ordinary as between the parties, *see* 11 U.S.C. § 547(c)(2)(A)-(B), and ordinary in the industry examined as a whole, *see* 11 U.S.C. § 547(c)(2)(C)." Matter of Midway Airlines, Inc., 69 F.3d 792, 797 (7th Cir. 1995).

The first portion of the test for determining what constitutes ordinary business practices as between the parties is subjective in nature. As Judge Meyers explained in Locke Home Products, Inc. v. Roadway Package System, Adv. 92-3041 (Dec. 21, 1992):

> In determining whether the payments made by the debtor to [the defendant] were made in the ordinary course of business, 'there is no precise legal test which can be applied; rather, [the] court must engage in a peculiarly factual analysis.' Ordinary course of business is determined from the way the parties actually conducted their business affairs, and not by merely looking to contractual terms neither party actually followed.

Id. at 3, quoting In re Fulghum Const. Corp., 872 F.2d 739, 743 (6th Cir. 1989).

It is certainly within the ordinary course of business for a company that specializes in steel fabrication to order supplies from a company that specializes in protective coatings on credit, thus satisfying § 547(c)(2)(A). Therefore, the Court must determine whether the transfers in question were made in the

ordinary course of business as between the parties and whether they were made pursuant to ordinary business terms.

In determining whether a transfer was made in the ordinary course of business as between the parties, courts generally compare the parties' pre-preference transactions with those occurring during the preference period, focusing on five (5) factors:

(1) the length of time the parties were doing business together;
(2) whether the amount or form of payments differed from past practices;
(3) whether the creditor engaged in any unusual collection activity;
(4) the circumstances under which the payments were made; and
(5) the timing fo the payments

See, H.L. Hanson Lumber Co. of Galesburg, Inc., 270 B.R. 273, 277 (Bankr. C.D. Ill. 2001). The only real evidence presented in this case involved the timing of the plaintiff's payments to the defendant both before and during the preference period.

In the present case, while the terms of Ameron's invoices were "net 30 days," the record indicates that prior to the preference period, only one of the five payments made by the plaintiff to the defendant was within these terms. The other payments ranged anywhere from 21 to 71 days late, with the average payment being 38.6 days late. During the preference period, the debtor continued to make late payments to the defendant, with only two of twelve invoices being paid in a timely manner. Payments during the preference period ranged from 1 to 47 days late, with the average payment being 13 days late. Obviously, the payments made during the preference period, while still untimely, were made somewhat sooner than payments made prior to the preference period. However, the Court does not find the difference to be sufficiently significant as to indicate that the payments during the preference period were made outside the ordinary course of the parties' business. As the Eleventh Circuit Court of Appeals has noted, "It seems clear . . . that § 547(c)(2) should protect those payments which do not result from 'unusual' debt collection or payment practices." In re Craig

Oil Co., 785 F.2d 1563, 1566 (11th Cir. 1986); see also, Matter of Anderson-Smith & Associates, 188 B.R.679, 685-686 (Bankr. N.D. Ala. 1995).

Having determined that the payments were made within the ordinary course of the parties' business, the court must now determine whether the payments were made pursuant to ordinary business terms as required by 11 U.S.C. § 547(c)(2)(C). In Matter of Tolono Pizza Products Corp., 3 F.3d 1029 (7th Cir. 1993), the Seventh Circuit Court of Appeals explained that

> 'ordinary business terms' refers to the *range* of terms that encompass the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection (C) .

Id. at 1033. This has been interpreted as requiring the creditor to present some objective evidence as to its competitors' practices in order to establish the "ordinary business terms" for the industry in question. See, Midway Airlines, 69 F.3d at 799 (7th Cir. 1995).

While a creditor need not produce expert witnesses to provide testimony regarding industry standards, the court must be provided with some "external datum." Id. at 798. In the instant case, the defendant offered only its own Policy and Procedure Manual, which sets forth its individual credit and collection policies. However, there was no evidence produced indicating that the policies set forth in the manual are ordinary for the industry in question, and, in fact, the defendant offered no evidence regarding the practices or procedures of similar businesses. Accordingly, the Court finds that the defendant has failed to sustain its burden as § 547(c)(2)(C) and, consequently, its "ordinary course of business defense" must also fail.

Conclusion

The plaintiff having sustained its burden of proof under § 547(b), and, the defendant having failed to

prove an affirmative defense, the Court finds that payments in question constitute avoidable preferential transfers. Judgment shall enter on plaintiff's complaint in the amount of $18,155.66.

Counsel for the plaintiff shall serve a copy of this Opinion by mail to all interested parties who were not served electronically.

ENTERED: May 19, 2003

/s/ William V. Altenberger
UNITED STATES BANKRUPTCY JUDGE